IN THE

Supreme Court of the United States

October Term, 1961

No. 26 — JOHN BURRELL GARNER *et al.*, *Petitioners*,
v. STATE OF LOUISIANA

No. 27 — MARY BRISCOE *et al.*, *Petitioners*,
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On Writs of Certiorari to the Supreme Court of Louisiana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* FOR THE COMMITTEE ON THE BILL OF RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This motion of the Committee on the Bill of Rights of The Association of the Bar of the City of New York for leave to file the annexed brief *amicus curiae* is made pursuant to Rule 42, consent to the filing of a brief having been withheld by respondent.

The Association of the Bar of the City of New York, presently comprised of more than 7,000 lawyers admitted to practice in the State of New York, has since its organization in 1871 been active in expressing and implementing considered views on local, state and national matters affecting the law and the legal profession. These functions of the Association are generally performed through a committee responsible for the relevant subject-matter, acting by means of resolutions, reports, testimony before legislative committees and, on occasions when issues of paramount importance and special interest to the Bar are involved, as here, by participation as *amicus curiae* in pending litigation. The Association's Committee on the Bill of Rights is charged by the By-Laws of the Association with responsibility for matters relating to those provisions of the United States Constitution "which are directed at protecting the individual against oppression by government."

The grant of certiorari by the Court in these cases emphasizes the fact that they evoke questions of national significance considerably beyond the usual implications of local prosecutions of individuals for "disturbing the peace." Directly involved here is the question whether a State denies the equal protection of the laws, within the purview of the Fourteenth Amendment, by the arrest and conviction of persons (in these cases, Negroes) for peaceably seeking service of food on a non-discriminatory basis in commercial establishments open to the public. Although other questions and arguments are being advanced by petitioners, the Committee on the Bill of Rights believes —and has limited the annexed brief *amicus curiae* accordingly—that the decision of the Court should meet squarely the issue presented here of State enforcement of racial discrimination in such commercial establishments. If it does not do so, the present uncertainty as to the applicable law will continue to invite testing by persons on both sides of the issue, with resulting harm to the communities involved and to the Nation.

This Committee also considers that these cases raise fundamental questions concerning the judicial power and function. Courts traditionally are empowered to act where conflicts extend to an area of cognizable property rights. However, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), establishes that no organ of the State, and more particularly its judiciary, may serve as the instrument of constitutionally prohibited racial discrimination. An underlying issue here is whether the holding in *Shelley* should be departed from in these cases because they arise in a context of potential community tension. This committee of lawyers particularly concerned with effectuation of the protections of the Constitution for individual freedom has a concrete interest as *amicus curiae* in cases which thus appear likely at least to illumine, and perhaps to define, a vital aspect of the scope of the judicial function and power within the limitations of the Constitution.

WHEREFORE, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* FOR THE COMMITTEE ON THE BILL OF RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Interest of *Amicus Curiae*

The interest of the Committee on the Bill of Rights of The Association of the Bar of the City of New York as *amicus curiae* and the reasons for submitting this brief are set forth in the annexed Motion for Leave to File Brief.

Question Presented

This brief is addressed to the question whether a State denies the equal protection of the laws by arresting and convicting for disturbing the peace Negroes who peaceably seek service by remaining seated at a lunch counter located in a commercial establishment open to the public.

Statement

These cases have been brought here on writs of certiorari to review convictions in a court of the State of Louisiana of persons who were arrested for disturbing the peace when they remained seated at public lunch counters located in commercial establishments after being refused food service because they were Negroes. These are the first cases to bring before the Court the issue of State enforcement of racial discrimination in the context of what have come to be known as "sit-ins." A statement of the facts relied on in the argument submitted in this brief of *amicus curiae* is presented here for the convenience of the Court, without intending to duplicate the statements of the facts of the individual cases set forth in the briefs of the parties.

In *Garner*, No. 26, the two petitioners are Negro men, college students in Baton Rouge, Louisiana (R. 8). They entered Sitman's Drug Store in downtown Baton Rouge on March 29, 1960, and sat down at the lunch counter (R. 30). The owner told them they could not be served, but one of them replied that they wanted coffee and both remained seated at the counter (R. 30). The policeman on the beat was in the store at the time and he, apparently without complaint from anyone else, called superior officers from headquarters (R. 31, 34-35). The latter advised petitioners that they were violating the "disturbing the peace"

law,[1] and requested them to leave (R. 35). Petitioners refused, and were arrested (R. 35-37).

The store owner testified that Negroes are served at the counters in the drug store section of his establishment—he said they "are very good customers" (R. 32)—but that he does not "have the facilities" for serving Negroes at the lunch counter in the adjoining coffee shop section (R. 31-32). One of the petitioners told the police officer he had purchased an umbrella in the store (R. 35). When petitioners entered, at the noon hour, there were white customers seated at the counter, but the owner could not recall how many (R. 33). No customers complained to him, he did not speak to the police officers, and no one else complained to them (R. 33, 34-35).

---

1. The police captain in his testimony referred to "Act 103" (R. 35). At the time of the events in question here, La. Rev. Stat. §14:103 (1950) provided:

> "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
>
> (1) Engaging in a fistic encounter; or
>
> (2) Using of any unnecessarily loud, offensive, or insulting language; or
>
> (3) Appearing in an intoxicated condition; or
>
> (4) Engaging in any act in a violent and tumultuous manner by three or more persons; or
>
> (5) Holding of an unlawful assembly; or
>
> (6) Interruption of any lawful assembly of people; or
>
> (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.
>
> Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days, or both."

Subsequently, the statutory definition of disturbing the peace was expanded to deal more specifically with, *inter alia*, conduct like that involved in the "sit-ins." See La. Rev. Stat. §§14:103, 14:103.1 (Supp. 1960).

The police captain testified that he arrested petitioners because he believed they were disturbing the peace "by their mere presence" at the lunch counter (R. 35-36). Thus, he testified (R. 35):

> "A. Well, the only thing that I can say is, the law says that this place was reserved for white people and only white people can sit there and that was the reason they were arrested."

The trial court's oral finding of guilt was based on the fact that petitioners (R. 37)

> "were seated at the lunch counter in a bay where food was served and they were not served while there, and officers were called and after the officers arrived they informed these two accused that they would have to leave, and they refused to leave."

Petitioners were each sentenced to 30 days in the parish jail and to pay a fine of $100 or serve an additional 90 days in jail (R. 41).

The petitioners in *Briscoe*, No. 27, five men and two women, also Negro college students in Baton Rouge (R. 8), entered the Greyhound Bus Station in Baton Rouge on March 29, 1960, took seats at the lunch counter, and started ordering (R. 30). A waitress told them they would have to go "to the other side" to be served (R. 30-31). The police were called, either by a bus driver or a woman employee (R. 33, 34, 38). The police asked petitioners to get up and leave (R. 35). They remained seated without speaking, but when placed under arrest went along peacefully with the officers (R. 35-36).

The Bus Station has another eating place for colored people (R. 32-34). The waitress testified that over the counter at which she refused to serve petitioners was a sign reading "Refuse service to anyone," and that her under-

standing of instructions from her superior was to refuse to serve Negroes (R. 32-33). Petitioners did nothing other than give their orders and continue to sit at the counter (R. 32-33, 35, 37), and the only reason the waitress refused to serve them was that they were Negroes (R. 31-32). There were no other people waiting to be served while petitioners were sitting at the counter (R. 34).

The police captain stated that petitioners were arrested for disturbing the peace by the "fact that their presence was there in the section reserved for white people" (R. 36). Thus, he testified (R. 38):

> "Q. You requested them to move then because they were colored, is that right, sitting in those seats?
>
> "A. We requested them to move because they were disturbing the peace.
>
> "Q. In what way were they disturbing the peace?
>
> "A. By the mere presence of their being there."

The trial court's finding of guilt was similar to that in the *Garner* case, which was tried on the same day (R. 38-39). All the petitioners here received the same sentence as those in *Garner*—30 days in jail and a fine of $100 or an additional 90 days (R. 43-44).

Petitioners in *Hoston*, No. 28, are other Negro college students in Baton Rouge (R. 7), five men and two women. They entered the S. H. Kress and Company store in Baton Rouge about two o'clock on March 28, 1960 and sat down at seats at various places along the lunch counter (R. 29, 30). The manager told a waitress to advise them that they would be served at another counter, across the store, reserved for colored people (R. 29). Petitioners continued to sit, and the manager called the police (R. 30). The police officers asked petitioners to leave; one of them said she wanted a glass of iced tea, but the Chief of Police

told her "they were disturbing the peace and violating the law by sitting there" (R. 36). When petitioners did not move to get up, they were placed under arrest (R. 36).

The manager testified that "it isn't customary for the two races to sit together and eat together" at the lunch counter in the Kress store (R. 30, 34), but that it is customary for white and colored persons to shop together elsewhere in the store (R. 31-32). There were Negroes in the store at the time of this incident (R. 37). The manager stated that petitioners were not served at the lunch counter because it was "not customary" to serve Negroes there, and that petitioners did not do anything other than sit at the counter which he would consider disturbing the peace (R. 33).

The police captain also testified that petitioners did nothing other than sit at these counter seats that he considered disturbing the peace (R. 37). He arrested petitioners on instructions of the Chief of Police, who had accompanied him to the store (R. 36).

The finding of guilt by the trial court was similar to that in the two preceding cases, with which this one was tried (R. 38-39). The court noted that petitioners "remained seated at the counter which by custom had been reserved for white people" until arrested (R. 39). The jail sentences and fines of these petitioners were the same as in the other two cases (R. 43-44).

Convictions in the three cases were sustained by the Supreme Court of Lousiana in memorandum orders refusing writs with a statement that the rulings of law by the trial court "are not erroneous" (*Garner* R. 53, *Briscoe* R. 56, *Hoston* R. 55-56).

Summary of Argument

Equal opportunity to purchase food in a place open to the public is protected by the Fourteeenth Amendment against infringement by State action based on race or color. State courts may not, by civil or criminal sanctions, enforce discriminations originating in private conduct. Here the arrests and convictions brought "the full coercive power of government" (*Shelley* v. *Kraemer*, 334 U. S. 1, 19 (1948)) to bear in support of discriminatory refusals to serve petitioners at public lunch counters, for it is clear in the records of these cases that petitioners were arrested solely because they were Negroes peacefully attempting to be served.

The extent to which privately-owned property is affected by rights in others depends upon the extent to which the owner has opened the property for use by the public. Thus, State sanctions against the exercise of constitutional rights on privately-owned property open to the public and State-enforced segregation in privately-owned local transportation facilities have been held unconstitutional. In the present cases, statutes of general applicability have been applied to provide effective State participation in the enforcement of racial discriminations by store proprietors.

The Fourteenth Amendment requires that peaceful activities by Negroes seeking equal treatment in normal economic transactions in the circumstances presented here be immune from coercive sanctions interposed by the police or courts of a State. These cases involve nothing more. Reversal of the convictions will leave the private parties to the dispute over segregation at the lunch counters to work out a resolution of their differences by lawful means of persuasion and pressure, while affirmance would result in continued reliance upon police and court action to perpetuate discrimination in places open to the public.

ARGUMENT

It is a denial of the equal protection of the laws for a State to arrest and convict for disturbing the peace Negroes who peaceably seek service by remaining seated at a lunch counter located in a commercial establishment open to the public.

Petitioners in each of these cases, Negro college students in Baton Rouge, Louisiana, were arrested when, seeking to be served food at public lunch counters located in stores and a bus terminal in that city, they remained seated at the lunch counters after being refused service on the sole ground that they were Negroes. Although no disturbance in fact occurred, petitioners were convicted and sentenced to jail for "disturbing the peace," defined by La. Rev. Stat. §14:103(7) (1950) as any act committed "in such a manner as to unreasonably disturb or alarm the public" (full text *supra* p. 3, note 1). For the reasons stated in the annexed Motion for Leave to File Brief, the Committee on the Bill of Rights of The Association of the Bar of the City of New York submits this brief as *amicus curiae* in support of the position that arrest and conviction of petitioners in these circumstances constituted State action enforcing discrimination based on race or color in the opportunity to purchase food at a place open to the public, and as such deprived petitioners of the equal protection of the laws in contravention of the Fourteenth Amendment.[2]

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2. Believing that the issue of State enforcement of racial discrimination in the circumstances presented in these cases is of nationwide public importance (see annexed Motion for Leave to File Brief), and that it is, moreover, in the context of the records of these cases the narrowest issue squarely presented, *amicus curiae* has limited this brief to discussion of that issue. This limitation is

I

It has been established that equal opportunity to purchase food in a place open to the public is a substantial personal and property right protected by the Fourteenth Amendment against infringement by State action based on race or color. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Not only the opinion of the Court but each of the individual opinions in Burton is premised on this principle. See 365 U. S. at 721-22, 726-27, 727, 729. Indeed, the proposition "cannot be doubted," as the Court earlier said in relation to equal opportunity to purchase and occupy residential property. Thus, in *Shelley* v. *Kraemer*, 334 U. S. 1, 10-11 (1948), the Court said:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil

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not intended to express any opinion as to other questions or arguments presented by the parties in their respective briefs.

There have been numerous convictions since February 1960 in various State courts on facts generally similar to those of the present cases. See, *e.g.*, Petition for Certiorari, *Garner*, p. 28; Pollitt, "Dime Store Demonstrations: Events and Legal Problems of First Sixty Days," 1960 Duke L. J. 315. A number of petitions for certiorari have already been filed or may be expected to be filed this Term. Disposition of the present cases in favor of petitioners on the issue dealt with in this brief will govern at least *Avent* v. *North Carolina*, No. 85, and *Fox* v. *North Carolina*, No. 86, pending on petitions for writs of certiorari. Examination of the records in those cases reveals no significant distinction from the cases presently before the Court. In the North Carolina cases the arrests and convictions were under a criminal trespass provision, N. C. Gen. Stats. §14-134 (1953), rather than for disturbing the peace, but the position taken in this brief would apply to use of any criminal law sanction in similar circumstances.

rights and liberties which the Amendment was intended to guarantee."[3]

For as long as "State action" has been the touchstone of applicability of the Fourteenth Amendment, it has been accepted that discriminations originating with private conduct in which the State participates, or which are authorized or enforced by acts of the State, become subject thereby to the prohibition of the Amendment. See *Civil Rights Cases*, 109 U. S. 3, 11, 17, 24 (1883); *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Burton* v. *Wilmington Parking Authority, supra; cf. Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *NAACP* v. *Alabama*, 357 U. S. 449, 463 (1958).

Recognizing that courts have frequently been the organs of the State called upon to enforce discriminations originating in private conduct, this Court has held that State courts may not do so, either by civil or criminal sanctions. Thus, in *Shelley* v. *Kraemer, supra*, judicial enforcement by

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3. The intention of the framers of the Fourteenth Amendment that Negroes have equal opportunities to exercise basic economic rights, free of discriminatory restrictions or prohibitions imposed or enforced by State action, was spelled out in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, the drafting and enactment of which occurred contemporaneously with the drafting and approval of the Fourteenth Amendment by the 39th Congress. The statute, whose text and history were set out in *Shelley* in support of the passage quoted *supra*, provides (as now codified in 42 U. S. C. §1982):

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Court has held that the Amendment and this statute protect the same rights. *Hurd* v. *Hodge*, 334 U. S. 24, 30-33 (1948); *Shelley* v. *Kraemer, supra*; *Buchanan* v. *Warley*, 245 U. S. 60, 75-79 (1917). Moreover, it is apparent that the word "right" was used in the statute in a broad sense to proscribe all State action denying equality of legal privileges on account of race. *Cf. Takahashi* v. *Fish and Game Comm'n*, 334 U. S. 410, 419-20 (1948).

injunction of a restrictive covenant against occupancy of residential property by non-whites was held to violate the Fourteenth Amendment. Thereafter, *Barrows* v. *Jackson*, 346 U. S. 249 (1953), held that such a covenant could not be given indirect judicial enforcement by an action for damages against a white owner who sold property in breach of the restrictive covenant. In *Gayle* v. *Browder*, 352 U. S. 903 (1956), the Court nullified State and local criminal sanctions for the enforcement of segregation on privately-owned local buses.[4] A similar principle was applied earlier in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), which invalidated application of a general criminal trespass law to persons exercising a constitutional right (there, distribution of religious literature) on the property of a privately-owned "company town" in opposition to the edict of the landowner.

The doctrine of these cases is most familiarly identified with *Shelley* v. *Kraemer*. The Court there stated that the protection of the Fourteenth Amendment is invoked when private discriminatory acts are carried out by "the active intervention of the state courts, supported by the full panoply of state power," and when the State has "made available to [private] individuals the full coercive power of government" to enforce such discrimination (334 U. S. at 19). In the present cases, the arrests of petitioners by local police officers, as well as their subsequent convictions for "disturbing the peace"—all avowedly based solely on

4. The *per curiam* opinion of this Court, affirming *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), merely cited *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Baltimore* v. *Dawson*, 350 U. S. 877 (1955); and *Holmes* v. *Atlanta*, 350 U. S. 879 (1955), each of which had dealt with racial discrimination in facilities owned and operated by governmental entities. The local buses in *Gayle* were owned and operated by a business corporation. Thus the *Gayle* decision is direct authority that a State may not utilize its criminal-law sanctions to enforce discrimination in privately-owned facilities used by the public, as it could not with respect to governmental facilities used by the public. See also *infra* pp. 15-16.

their peaceful attempts to be served at public lunch counters (*Garner* R. 35-36, *Briscoe* R. 35-38, *Hoston* R. 37; see *supra* pp. 4, 5, 6)—brought to bear in support of the discriminatory refusals to serve them "the full coercive power of government."

The participation of the State is emphasized in these cases by the fact that, although in two of them the police were called by the manager or an employee, it appears that in each case the arrests were made on the initiative of the police, without direct request by the person in charge of the lunch counter (*Garner* R. 31, 34-37, *Briscoe* R. 33, 34-38, *Hoston* R. 30, 36). In any event, the individual in charge had no right to seek the support of the police to enforce racial discrimination in these public places. As the Court said in *Shelley* v. *Kraemer*, *supra*, 334 U. S. at 22:

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."

Petitioners peaceably sought service by remaining seated at these lunch counters, located in stores open to the public and where white persons would be served who sat down in the same fashion (*Garner* R. 32, *Briscoe* R. 31-32, *Hoston* R. 30). Their arrests and convictions under these circumstances provided support for the private owners' segregation rules through State action of the most direct sort, combining the coercive force of the police with the ultimate sanction of the judicial arm of the State.[5]

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5. It is, of course, immaterial to the issue of Fourteenth Amendment violation whether the police or the courts act under a statute expressing the aim of enforcing discrimination in privately-owned facilities (*Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Gayle* v. *Browder*, 352 U. S. 903 (1956)), or act to enforce such discrimination under a statute of general applicability (*Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960); *cf. Marsh* v. *Alabama*,

II

Application of the principles outlined above to these cases is not precluded by the fact that the discriminatory conduct being enforced by the State is that of the proprietors of privately-owned commercial establishments. The Court has recognized that the extent to which a property owner is affected by rights in others depends upon the extent to which he himself, "for his advantage, opens up his property for use by the public in general." *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946). There the Court stated:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[6]

Marsh decided that sidewalks in the business block of a "company town" were as open for free-speech purposes as those of municipalities. Subsequently, lower courts have made analogous rulings rejecting trespass charges in criminal and civil cases involving picketing on the sidewalks of privately-owned shopping centers. *E.g.*, *State* v.

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326 U. S. 501 (1946)), or, indeed, act to enforce such discrimination without relying on statutory authority (*Shelley* v. *Kraemer*, 334 U. S. 1, 14-18 (1948); *Baldwin* v. *Morgan*, 287 F. 2d 750, 756-60 (5th Cir. 1961)). For "State action *of every kind* * * * which denies * * * the equal protection of the laws" is proscribed by the Amendment. *Civil Rights Cases*, 109 U. S. 3, 11 (1883) (Emphasis added).

6. The Court reiterated this theme in *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948):

> "And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh* v. *Alabama*, 326 U. S. 501 (1946)."

Williams, 44 Lab. Rel. Ref. Man. 2357, 2360-62 (Baltimore Crim. Ct. 1959); *Freeman* v. *Retail Clerks Union*, 45 Lab. Rel. Ref. Man. 2334, 2342 (Wash. Super. Ct. 1959). In one such case, a court in Raleigh, North Carolina, relying on *Marsh*, dismissed trespass charges against Negroes who were protesting segregated lunch counters in the stores of a shopping center by demonstrating on its privately-owned sidewalks. See New York Times, April 23, 1960, p. 21, col. 1; Pollitt, *supra* note 2, at 350 n.206. Similarly, picketing within New York's Pennsylvania Station, directed against a news stand located in a public concourse there, has been held, partly on the authority of *Marsh*, to be immune from prosecution as disorderly conduct (under a definition similar to that of disturbing the peace in the statute involved here). *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277 (Magis. Ct. 1948).

Each of the cases described dealt with a privately-owned sidewalk or concourse maintained by the owner for access by the public to places of business. Here it is such places of business, open to traffic and trade by the public, that are in question. The stores and bus terminal involved here, like the locations dealt with in *Marsh* and the cases following it, have been opened up by the proprietors for use by the public (*Garner* R. 32, *Briscoe* R. 32-34, *Hoston* R. 31-32, 37; see *supra* pp. 3, 4, 6). State enforcement of racial discrimination therein by criminal sanctions is therefore offensive to the prohibition of the Fourteenth Amendment.[7]

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7. No special challenge to the traditional right or power of a merchant to select his customers individually is presented by these cases. Enforcement of that principle has never been absolute. Like any economic power or property right, it is bounded by limitations drawn from superior legal sources, including the Constitution. See *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), *supra* note 6; *cf., e.g., United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *California Inter-Insurance Bureau* v. *Maloney*, 341 U. S. 105 (1951).

In similar factual circumstances involving segregation on privately-owned local buses, governmental enforcement of segregated-seating rules originating with the private owner has been held to violate the Fourteenth Amendment. *Gayle* v. *Browder*, 352 U. S. 903 (1956), see *supra* note 4; *Flemming* v. *South Car. Elec. & Gas Co.*, 239 F. 2d 277 (4th Cir. 1956); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960).

In a decision affirmed by this Court, a three-judge District Court said, citing *Shelley* v. *Kraemer*, that enforcement of the bus company's rules by the police and courts raises the difference, "a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law." *Browder* v. *Gayle*, 142 F. Supp. 707, 715 (M. D. Ala. 1956), *affirmed, Gayle* v. *Browder, supra*. A ruling to the same effect was made by the Fifth Circuit in the *Boman* case, *supra*, which quoted the District Judge's comment that "the police officers were without legal right to direct where they [Negroes who refused to move to the rear of a bus, or to leave it when the driver took it to the barn upon their refusal] should sit because of their color. The seating arrangement was a matter between the Negroes and the Transit Company."[8]

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8. 280 F. 2d at 533 n.1. The entire discussion of this point by District Judge Grooms is illuminating in relation to the facts of the present cases. As quoted by the Court of Appeals, *ibid.*, it reads:

> "A charge of 'a breach of the peace' is one of broad import and may cover many kinds of misconduct. However, the Court is of the opinion that the mere refusal to obey a request to move from the front to the rear of a bus, unaccompanied by other acts constituting a breach of the peace, is not a breach of the peace. In as far as the defendants, other than the Transit Company, are concerned, plaintiffs were in the exercise of rights secured to them by law.
>
> . . . .
>
> "Under the undisputed evidence, plaintiffs acted in a peaceful manner at all times and were in peaceful possession of the seats which they had taken on boarding the bus. Such being

Each of the bus cases just discussed held that police and court enforcement of the private owner's rule of segregated seating in local buses is unconstitutional, without reference to the affirmative statutory requirement of nondiscrimination that exists with respect to facilities of interstate travel. *Cf., e.g., Boynton* **v.** *Virginia,* **364 U. S. 454 (1960). Similarly, the Fifth Circuit has recently held to be unconstitutional discriminatory police action regarding use of the "white" waiting room in a railroad station by Negroes other than interstate travelers. In** *Baldwin* **v.** *Morgan,* **287 F. 2d 750 (5th Cir. 1961), injunctive relief was granted against a local police practice of checking Negroes found in the "white" waiting room to see if they held interstate tickets. The Court of Appeals ruled that, since** *Gayle* **v.** *Browder, supra,* **"it is too late now to question the absolute right of Negroes** *engaged in intrastate commerce* **to be free from discrimination by police officers on the basis of race" (287 F. 2d at 758-59) (Emphasis added).[9]**

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the case, the police officers were without legal right to direct where they should sit because of their color. The seating arrangement was a matter between the Negroes and the Transit Company. It is evident that the arrests at the barn were based on the refusal of the plaintiffs to comply with the request to move since those who did move, though equally involved except as to compliance, were not arrested.

"Under the facts in this case, the officers violated the civil rights of the plaintiffs in arresting and imprisoning them. Ordinance 1487-F, and their 'willful' refusal to move when directed to do so, did not authorize or justify their conduct."

The full opinion of the District Judge is reported *sub nom. Boman* v. *Morgan,* 4 Race Rel. L. Rep. 1027 (N. D. Ala. 1959).

9. This part of the Fifth Circuit's decision was based upon evidence that such discriminatory police action had in fact occurred, independent of a State Public Service Commission rule requiring segregated waiting rooms, which was invalidated elsewhere in the opinon (*compare* 287 F. 2d at 756-60 *with id.* at 753-56).

It is clear in the records of all of the present cases that petitioners were arrested solely because they were Negroes seeking to be served at these public lunch counters. (*Garner* R. 35-36, *Briscoe* R. 35-38, *Hoston* R. 37; see *supra* pp. 4, 5, 6). The trial court's oral findings of guilt were explicitly placed on that basis (*Garner* R. 37, *Briscoe* R. 38-39, *Hoston* R. 39), and were sustained by the Supreme Court of Louisiana in memo ' ndum orders (see *supra* p. 6). Thus, the highest court of the State has, in effect, construed a criminal statute of general applicability "as authorizing discriminatory classification based exclusively on color" by the proprietors of these stores. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727 (1961) (opinion of Stewart, J.); *id.* at 729 (opinion of Harlan, J., joined by Whittaker, J.); *cf. id.* at 727 (opinion of Frankfurter, J.).

The proprietors' discriminatory rules were given forceful effect by the totality of police and judicial actions in these cases. Though the element of governmental property which the majority of the Court found controlling in *Burton* is not involved here, the significant effect of the State enforcement actions in these cases "indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.* at 724 (opinion of the Court).

III

The traditional considerations for limiting constitutional adjudication to the facts of actual cases before the Court are compelling in the sensitive area of race relations, and particularly so where the claim to freedom from State-enforced racial discrimination is opposed by a claim to freedom in the management of private property. The judicial precedents discussed in this brief indicate that

the resolution of such conflicting claims may vary with the circumstances. Thus the decision of the Court in the present cases need not be taken as having decided issues not presented in those cases on their own facts. It seems appropriate, therefore, to note in summary form some matters *not* involved in the facts of the present cases:

(1) The issue of affirmative remedies against discriminatory acts does not arise in these criminal cases. The question here is simply whether peaceful activities by Negroes seeking equal treatment in normal economic transactions are immune from criminal sanctions interposed against them by the police or courts of a State or local government.

(2) Decision here need not establish the extent to which privately-owned property may be used for purposes not intended by the owner, for in the cases now before the Court petitioners merely attempted to use the lunch counter facilities of these stores in the manner in which they were intended to be used—by sitting down at the counter and ordering food or beverages.[10]

(3) Nor do these cases present for decision any issue as to discriminatory exclusion from places affected with a countervailing right of privacy on the part of the property owner, such as a private home. *Cf. Breard* v. *Alexandria*, 341 U. S. 622, 641-45 (1951).

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10. That petitioners' motives may have included a desire to protest or demonstrate against the discriminatory practices in question is immaterial, for their convictions had to be, and were, based on their overt actions, and the form petitioners' protest or demonstration took was merely seeking service in the normal manner.

The convictions cannot be sustained upon petitioners' refusals to leave the premises upon orders of the police. Such refusals cannot be deemed criminal in circumstances in which the police had no right, under the Constitution, to demand that petitioners leave the premises. *Cf., e.g., Boynton* v. *Virginia*, 364 U. S. 454 (1960); *id.* at 464-65 (dissenting opinion); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960), *supra* p. 15 and note 8.

Only commercial facilities open to traffic and trade by the public are involved in the present cases.

(4) The use of force by a store proprietor as an alternative to police action in seeking to remove Negroes seeking service is not involved. There is nothing in the records of these cases to indicate that forceful removal was even contemplated.[11]

(5) Nor is there any showing here that petitioners' conduct did, or in the absence of action by the police would, provoke violence or disorder by persons other than the proprietor.[12] In any event, that others may respond with disorder to peaceable activities in pursuit of equal treatment should not permit State or local authorities to stave off possible disorder by sanctions against the persons peacefully seeking such treatment. *Cf. Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958).

All that these cases involve is the question whether Negroes shall be free of "the full coercive power of gov-

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11. Therefore, it is not necessary here to consider whether constitutional complusions may affect causes of action and defenses in cases involving such forceful removal. As to that, see Schwelb, "The Sit-In Demonstration: Criminal Trespass or Constitutional Right?" 36 N. Y. U. L. Rev. 779, 800-08 (1961).

12. The incidents of violence against the "Freedom Riders" earlier this year cannot reasonably be deemed a pragmatic argument against recognition here of the right to be free of State-enforced segregation in the new context of lunch counters. Those isolated incidents of violence did not occur in response to any ruling marking a new advance against discrimination, but on the occasion of a highly-publicized exercise of a right long established. See, *e.g.*, *Morgan* v. *Virginia*, 328 U. S. 373 (1946).

There is evidence that in many Southern communities peaceful resolution of the struggle sparked by the "sit-ins," with elimination or reduction of discrimination at the lunch counters, has occurred. See, *e.g.*, New York Times, June 6, 1960, p. 1, col. 2; June 24, 1960, p. 1, col. 6; July 25, 1960, p. 1, col. 8; August 11, 1960, p. 14, col. 5; October 18, 1960, p. 47, col. 5; January 22, 1961, p. 72, col. 8; May 7, 1961, §4, p. 10, col. 1.

ernment" (*Shelley* v. *Kraemer*, 334 U. S. 1, 19 (1948)) against their efforts to seek equality of service in the purchase of food in commercial establishments. The effect of a decision reversing these convictions will be to leave the private parties to the dispute over segregation at these lunch counters—the merchants and Negro residents of the community—to work out a resolution by lawful means of persuasion and pressure. This is the necessary result of the Fourteenth Amendment's bar to State enforcement of discrimination, as in other instances where the Court has ruled that judicial sanctions may not be interposed in economic or social struggles between contending forces of private interests. *Cf. Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

On the other hand, affirmance of the decision below would offer little inducement to the merchants to work toward a peaceful resolution of the dispute raised by the claim of Negro residents of the community for equal treatment. Instead, police and court action would continue to be relied upon to perpetuate discriminatory practices in places open to the public. Such action the Fourteenth Amendment forbids the States to take.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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